Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-410

LEE-HY PAVING CORP. and DAVIS E. CLEM,
Petitioners,

against

MARGUERITE T. O'CONNOR, as Administratrix of the Goods, Chattels and Credits of DANIEL J. O'CONNOR, Deceased,
Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-361

BOSTON HOSPITAL FOR WOMEN,
Petitioner,

LUKE GILLESPIE,
Co-Defendant,

against

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,
Respondents.

IN THE
SUPREME COURT OF THE UNITED STATES
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No. 78-268

LUKE GILLESPIE,
Petitioner,

against

GLORIA SCHWARTZ, WILLIAM SCHWARTZ and BOSTON HOSPITAL FOR WOMEN,
Respondents.

Brief for Respondents in Opposition to the Petitions for Writs of Certiorari.

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Brief for Respondents in Opposition to the Petitions for Writs of Certiorari.

The Sole Issue Presented.

From a Constitutional due process perspective, does the decisionally created procedure (*Seider v. Roth*, 17 N. Y. 2d 111) allowing a New York resident to obtain *in rem* jurisdiction in New York by attaching a nonresident defendant's liability insurance policy in New York comport with the traditional standards of fairness and substantial justice enunciated in *International Shoe v. Washington*, 326 U. S. 310 (1945), and iterated in *Shaffer v. Heitner*, 433 U. S. 186 (1977)?

Stated otherwise, are not the attached insurance policies so inextricably related to these resident plaintiffs' causes of action, and are not the insurance companies in

actuality the real parties in interest rather than the insureds, so as to constitute contacts with New York State sufficient to make it reasonable and just for New York State to exercise jurisdiction?

Respondent submits that those questions should be answered in the affirmative upon the *ratio decidendi* of the respective opinions of Judges Friendly, Dooling and Nickerson in the Courts below.

The salient facts in each of the cases have been fully set forth in the said opinions and in the petitions for the writs. Accordingly, in the interest of brevity, the facts will not be repeated herein.

ARGUMENT.

I.

The petitions should be denied for want of a substantive federal question. The *Shaffer* case did not promulgate any new principles requiring a rejection of the limited jurisdiction procured by the *Seider* attachments under the particular facts of the instant cases.

A. Prologue.

Petitioners' reliance on *Shaffer* as the springboard for their generic attack on all *Seider* attachments is misplaced because it directly conflicts with two kindred traditional principles: (1) the *Shaffer* opinion must be read "as the product of preoccupation with [its] special facts" (*Freeman v. Hewitt*, 329 U. S. 249, 252); (2) a person to whom a statute or decisional rule may constitutionally be applied will not be heard to challenge the statute or rule on the ground that it may conceivably be applied

unconstitutionally to others in other situations not before the Court (see *Broadrick v. Oklahoma*, 413 U. S. 601, 610).

When read in light of those caveats, the conclusion is ineluctable that *Shaffer* does not support petitioners' position. *Shaffer* was concerned with a totally dissimilar and unrelated factual situation and may be cited solely for the general proposition of law embraced in its opinion within the framework of the particular facts of that case.

Moreover, the *Seider* attachment procedure came into existence based upon an awareness of and compliance with the standard of fairness enunciated in *International Shoe*. Those standards have merely been iterated by *Shaffer*. The *Seider* attachment procedure under attack continues to meet those standards.

B. The *Shaffer* facts.

Plaintiff Heitner was a nonresident of Delaware, having no contacts, relationships or interests with that State; nor did the State of Delaware have any contacts, relationships or interests with him.

Heitner brought a stockholder's derivative suit in the Delaware Chancery Court charging twenty-eight individual defendants in their capacity as present or former corporate officers or directors of Greyhound Corp. with breach of fiduciary duty resulting in the corporation's liability. Greyhound Corp. is incorporated under the laws of Delaware with its principal place of business in Phoenix, Arizona.

None of those twenty-eight defendants were residents of Delaware. None of the activities which led to the lawsuit took place in Delaware.

In rem jurisdiction over twenty-one of the twenty-eight individual defendants was obtained on the basis of Delaware's sequestration statute (10 Del. Code 366) pursuant to which their shares of Greyhound stock and certain options were "seized" by placing "stop transfer" orders or their equivalents on the books of the Greyhound Corp.

Crucial is the fact that the stocks and options which were attached were owned by the individual defendants as stockholders only. *Their ownership had nothing whatsoever to do with their position as officers or directors of Greyhound by reason of which they were being sued by Heitner.* In fact, Heitner was unable to obtain *in rem* jurisdiction over seven of the individual officers or directors who apparently owned no stock in Greyhound.

This Court placed emphasis on its conclusion that "there is no necessary relationship between holding a position as a corporate fiduciary and owing stock or other interests in the corporation" (433 U. S. at p. 214) and that the property "is not the subject matter of this litigation nor is the underlying cause of action related to the property" (433 U. S. at p. 213).

Under Delaware law the defendants whose property had been attached were required to enter a general appearance, thus subjecting them to *in personam* liability, before they could defend on the merits. In finding that "express purpose of a Delaware sequestration procedure is to compel the defendants to enter a personal appearance" (433 U. S. at p. 209), this Court further found, with resultant criticism, that "the only role played by the property is to provide the basis for bringing the defendant into court" (433 U. S. at p. 209).

Greyhound Corp., which possessed the attached property of the individual defendants, had no interest in the

outcome of the litigation as it affected the property attached, nor any duty or obligation to the defendants in connection with the controversy. *Greyhound Corp. was purely and simply a stakeholder.* If the individual defendants defaulted, or instead decided to retain attorneys to defend, and thereafter lost on the merits, the ownership of the stock would change hands as ultimately determined by the judgment obtained without involvement and defense on the part of Greyhound.

C. The *Shaffer* decision.

In reversing jurisdiction predicated on the sequestration under the aforesaid facts, this Court held that "all assertations of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny" (433 U. S. at p. 212). Mr. Justice Marshall delineated those standards as follows (433 U. S. at p. 207):

> "The case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that '[t]he phrase "judicial jurisdiction over a thing, is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."' Restatement (Second) of Conflict of Laws §56, introductory note. This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*.

> "This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum state, the defendant, and the litigation."

Therefore, and of paramount importance, is the fact that this Court clearly recognized that in determining the minimum contacts required by *International Shoe*, the property attached could provide such contact with the forum state, the defendant and the litigation.

D. The *Seider* attachment procedure complies with the standard of fairness enunciated in *Shaffer*.

1. The property attached

In every case brought under *Seider*, including these instant lawsuits, the property attached in New York is the defendant's insurance company's obligation to defend and indemnify the defendant under a policy of insurance issued to the defendant by the insurance company for the purpose of satisfying any judgment that may be obtained by plaintiff.

The *Shaffer* decision requires that a determination be made as to whether the insurance policy provides a contact among the forum state, the defendant, and the litigation, its relation to plaintiff's cause of action or to the controversy, and its "role" other than providing the basis for bringing defendant into court.

It is therefore of significant importance that in each *Seider* attachment in the instant cases, the defendant's insurance policy clearly relates to rights and duties directly stemming from plaintiff's cause of action. Unlike the Delaware sequestration procedure in *Shaffer*, the attached

insurance policy is directly related to the controversy, viz, the policy provides the defense and source of recovery in the action.

Federal and state statutory and case law have always recognized the importance of the insurance policy and its relationship to such controversies. Both federal and state rules specifically mandate the disclosure of the extent and amount of applicable insurance coverage (Rule 26[b] [2] of the Federal Rules of Civil Procedure and Section 3101 [f] of the New York CPLR) as relevant and material to a controversy.

Section 167, subdivision 1 of the New York Insurance Law, as well as other similar state statutes (see, e.g., Section 38.1-380 of the Virginia Code) make the insurance carrier directly liable to a plaintiff not only if the judgment against the insured is not properly paid, but even if the insured becomes bankrupt.

The insurance policy, therefore, not only protects the insured but it directly obligates the insurance carrier to pay persons holding judgments against the insured for liability covered in the policy, thus making the plaintiff a third party beneficiary under the policy. If the insurance carrier refuses to defend, it may be brought in as a third party defendant under Rule 14 of the Federal Rules of Civil Procedure (*Colton v. Swain*, 527 F. 2d 296, 303 [7th Cir. 1975]).

The importance of the role of the insurance policy as the attached property was recognized in *Minichiello v. Rosenberg*, 410 F. 2d 106 (2nd Cir. 1968), cert. den. 393 U. S. 844, when the Second Circuit, in distinguishing a *Seider* attachment from the type of attachment in *Harris v. Balk*, 198 U. S. 215 (1905), wrote at page 118:

> "In contrast, appellants' problem is significantly less serious than was Balk's in several respects. Balk had to decide whether to hire a Maryland lawyer to protect his interest in the $180 debt Harris owed him; the appellants are entitled to have lawyers in New York furnished by their insurers without expense. The Maryland judgment deprived Balk of money he could have used for whatever purpose he willed; *a Seider judgment would mean simply that liability policies on which appellants could not have relied for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured.* Whatever Balk's situation may have been, appellants are assured that they may defend the New York actions without exposing themselves to personal liability and that any recovery by the plaintiffs 'is necessarily limited to the value of the asset attached, that is, the liability insurance policy.' *Simpson v. Loehmann*" (emphasis supplied).

2. The defendants and the litigation; a recognition of realities rather than fiction.

Any determination as to whether "minimum contacts" exist so as to satisfy the concepts of "fair play and substantial justice" as required by *International Shoe* and *Shaffer,* must be based on a recognition of realities rather than fiction. Such practical appraisal cannot ignore the compelling fact that in every *Seider* attachment case the real party in interest, and the *de facto* defendant, is the insurance carrier regulated by and located in the State of New York.

The importance of this reality was made clear by the New York Court of Appeals in *Simpson v. Loehmann,* 21 N. Y. 2d 305, 311:

> "Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it

> selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation. (Citation omitted) Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large."

The concurring opinion of Judge Keating in *Simpson* additionally stated (21 N. Y. 2d at p. 313):

> "Likewise, we have on a number of occasions recognized that the real party in interest is the insurer and we have again given effect to the fiction sought to be perpetuated here only where the insurer would be prejudiced thereby.
>
> ". . . The decision in *Seider v. Roth* and the cases we decide today represent a recognition of realities and not fictions."

To the same effect, see also: *Watson v. Employers Liab. Assur. Corp.*, 348 U. S. 66, 74; *Dobkin v. Chapman*, 21 N. Y. 2d 490, 502, 504; *Oltarsh v. Aetna Ins. Co.*, 15 N. Y. 2d 111, 118; *Thrasher v. U. S. Liab. Ins. Co.*, 19 N. Y. 2d 159, 167; *Barrios v. Dade County of Florida*, 310 F. Supp. 744.

3. The interests of the State of New York: a rationale of reasonableness.

The basic premise of this Court's decision in *Shaffer* requires courts to eschew all labels pertaining to *in rem* jurisdiction and to look instead at the true relative interests of the real parties and the state in terms of fairness.

Accordingly, a summary of the relevant facts in all *Seider* attachments are deemed of prime importance. Thus, in the instant case:

1. Plaintiffs are residents of the State of New York who had chosen as the forum their home state which has an independent and significant interest in their protection and welfare, which regulates the defendants' insurance companies, and thus "has a substantial and continuing relation with the controversy" (see *Simpson*, 21 N. Y. 2d at p. 311).

2. The property attached in New York, i. e., defendants' insurance policies, is clearly related to the controversy and plays the most significant role in the litigation.

3. The real parties in interest are defendants' insurance carriers which are regulated by and permanently established in the State of New York and who are in full control of the litigation.

4. The *Seider* attachment procedure limits liability to the policies' coverage with no personal exposure to the insured defendants; thus the policies are applied "to the very object for which they were procured" (*Minichiello*, 410 F. 2d at p. 118).

CONCLUSION.

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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